Editor's note: Reconsideration denied by Order dated May 29, 1984

ROBERT C. SALISBURY

IBLA 83-960 Decided March 26, 1984

Appeal from decision of the Medford District Office, Bureau of Land Management, dismissing protest to the Woodrat Mountain Timber Sale (Tract 83-13). OR110-TS3-87.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals
A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed in the absence of a showing that the decision is clearly in error.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals
An appellant who levels specific criticisms of a BLM decision to proceed with a timber sale in an attempt to overturn the sale as being poorly planned and ill-conceived cannot prevail where the record shows that BLM complied with applicable law and procedures in offering the tract for sale and where many of the concerns and criticisms amount to mere expressions of disagreement with BLM's conclusions. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion.

APPEARANCES: Robert C. Salisbury, pro se; Hugh R. Shera, Medford District Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Robert C. Salisbury has appealed from the August 5, 1983, decision of the Acting District Manager, Medford District Office, Bureau of Land Management (BLM), denying a protest of the Woodrat Mountain timber sale (Tract 83-13). 1/ The protest was filed on July 26, 1983, charging generally

1/ The protest was filed by a number of "concerned" citizens, including Salisbury. On appeal, Salisbury claims to be representing all the citizens.

that the environmental assessment (EA) was inadequate, and expressing specific concern with regeneration problems.

Pursuant to established procedures relating to timber sales, the District Office proceeded to offer the tract for sale. Prospective bidders were notified that the contract could not be awarded until after action on the protest and any subsequent appeal, and that such might involve significant delays. 2/ Gail Willey Logging was the high bidder.

In its August 5, 1983, decision BLM stated:

> In your letter, you stated that you believe the Environmental Assessment Report to be inadequate. The report was a product of an interdisciplinary team which began analyzing the proposed action of the timber sale and its impacts several years ago. The detailed process included all of the disciplines shown on the EA cover sheet, having made field reviews plus written and oral inputs to prepare a report that accurately and briefly identified the proposed action, mitigating measures, and alternatives on a site specific basis. The team report was tiered into the Jackson-Klamath timber management environmental statement. This environmental assessment report was made available to the public for review. However, no comments were received. After your protest letter, it was reviewed by Jacksonville Resource Area personnel who determined the report was adequate and covers the Woodrat Timber Sale adequately.
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> In summary, the planning of the Woodrat Timber Sale has met all state and BLM management guidelines and is in conformance with the Federal Land Policy and Management Act, National Environmental Protection Act, and with the O&C Act of August 28, 1937, which governs the management of these lands. [3/] Your protest is therefore denied.

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fn. 1 (continued)
There is no evidence in the record that Salisbury is an attorney or otherwise authorized to practice before the Department. See 43 CFR 1.3. Thus, although he may represent himself on appeal, he cannot be considered as representing the interests of others. See United States v. Montgomery, 75 IBLA 358, 361 (1983). We will consider the appeal as that of Salisbury alone

2/ On Mar. 16, 1984, BLM filed a document with the Board requesting that its decision to award the contract be given full force and effect pursuant to 43 CFR 4.21(a). Rather than acting on this request, we have given the appeal expedited consideration.

3/ The "O&C Act" is the common reference to the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act which was adopted by Congress on August 28, 1937, 43 U.S.C. §§ 1181(a)-1181(f) (1976). Section 1 of that Act, 43 U.S.C. § 1181(a) (1976), provides, inter alia:

"Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be

Appellant's arguments on appeal may be summarized as follows:

1. The public received inadequate notice concerning the sale;

2. The lands proposed for sale do not meet the specifications of "high intensity" land; 4/

3. The proposed cutting involves lands described by BLM as unplantable;

4. The 55 acres described for overstory removal do not qualify for such treatment;

5. The sale is violative of visual resource management (VRM) provisions of the Jackson-Klamath Timber Management Final Environmental Statement (FES) in that it is in a residential area;

6. The proposed quarry development violates the VRM standards for the area;

7. BLM did not adequately consider scenic values along Sterling Creek County Road;

8. BLM proposes the illegal use of herbicides;

9. The threatened and endangered plant survey for the sale is inadequate for certain units; and

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fn. 3 (continued)
classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 1181c of this title, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. Provided, That nothing in this section shall be construed to interfere with the use and development of power sites as may be authorized by law."

4/ In In Re Lick Gulch Timber Sale, 72 IBLA 261, 269-70, 90 I.D. 189, 194 (1983), the Board explained "high intensity" lands as follows:

"[T]he EIS [environmental impact statement] noted that analysis of TPCC [Timber Production Capability Classification] data had disclosed wide variations in the productive capacities of commercial forest lands. As a result, three management classes for these lands were established: (1) High intensity forest management lands, (2) low intensity forest management lands, and (3) limited forest management lands. The latter two categories consist of lands where the regeneration period is expected to be in excess of at least 5 years, with category 3 lands being deemed to be considerably in excess of 5 years with ultimate successful reforestation uncertain. See EIS at 1-8 to 1-10. Only high intensity lands are included in the permanent forest base for purposes of determining the allowable cut for maintenance of sustained yield. * * * For land classified as high intensity forest management lands, such as those in the instant appeal, the regeneration period is basically 5 years."

10. The sale generally was ill-conceived and poorly planned.

Appellant requests as relief that the Board direct BLM to withdraw the timber sale in question and all proposed timber sales in the Jacksonville Resource Area south of T. 36 S. until all land in that area is reclassified. BLM filed a detailed response to each of appellant's charges explaining the basis for its actions.

[1] This Board has in numerous cases enunciated the standard of review it applies in cases such as this. A decision by BLM to proceed with a proposed timber sale, which was made after consideration of all relevant factors and which is supported by the record, will not be disturbed in the absence of a showing that the decision is clearly in error. In Re Otter Creek Timber Sale, 75 IBLA 380 (1983); Alan Winter, 62 IBLA 299 (1982); Preserve Our Scenic Environment, 47 IBLA 276 (1980).

We will proceed to discuss appellant's contentions in light of this standard of review.

The record fails to support appellant's assertion that the public received inadequate notice of the sale. The record shows that the fiscal year 1983 timber sale plan, of which the Woodrat Mountain sale was a part, was available for public review in June 1982. BLM stated in its response that no public comments were received on the Woodrat Mountain timber sale. Appellant claims that although the sale plan was available, it did not provide sufficient information on which to comment. Appellant contends that the relevant information, i.e., the EA, was not made available until May 1983. He states that the time for comment on the EA was inadequate.

The record belies this claim by appellant. With its response BLM included Attachment la which is a copy of a notice published on June 8, 1982, in "The Daily Courier," Grants Pass, Oregon. The last paragraph of that notice states: "Maps and environmental assessment of each of the 33 timber sales are available in the Medford District Office until Friday. The documents will be available at the BLM's Grants Pass Office located in the Post Office June 14-18." (Emphasis added.)

All of the units in the proposed Woodrat Mountain sale, except two, are classified as high intensity lands. Those two are low intensity management (LIM) study units scheduled for forestry intensive research (FIR). The classification is based on the Timber Production Capability Classification System (TPCC) which is a methodology for categorizing land according to its ability to produce timber. Appellant claims that the sale lands have been misclassified. BLM, on the other hand, asserts that its classification was verified during field examinations. It states that if an area was found not to meet the high intensity criteria, it was not included in the sale and was recommended for withdrawal from the allowable cut base.

In support of his contention of misclassification, appellant cites reforestation failures in the Jacksonville Resource Area (the resource area embracing the sale area) and poor soils in some of the units. BLM disputes appellant's allegations concerning reforestation failures. BLM states:

> Our reforestation records show only two units totaling 25 acres which were clear cut in the 60s and later withdrawn from the base due to reforestation failure in the southern portion of the Jacksonville Resource Area. Current records for the southern portion of the Jacksonville Resource Area show that 96 percent of all harvested units meet or exceed minimum stocking levels and only 4 percent are understocked or non-stocked.

(BLM Response at 1).

BLM admits that the Woodrat Mountain sale area is a problem reforestation area and that special reforestation techniques may be required. It states:

> As far as relying solely on past reforestation records to determine the regenerative ability of a tract of land, the board held [In Re Lick Gulch Timber Sale, 72 IBLA 261, 291, 90 I.D. 189, 206 (1983)] that "the past should never be viewed as the fixed absolute guide since such an approach necessarily concretizes any former mistakes for all time, and cannot make allowances for subsequent technical advances." The board also found, as we have stated in previous appeals, that many of the old units did not receive the management practices presently in use, and lack of site preparation and prompt planting of units was evident from records.

(BLM Response at 2).

We find that appellant has failed to show that the sale lands were misclassified as "high intensity" lands. Appellant's objection relates to reforestation problems. BLM has acknowledged past problems, but that fact alone does not establish his misclassification charge, especially in light of the more recent successes.

Appellant also believes that certain units may be misclassified because they contain the 718-701-R soil complex. Appellant quotes from page 9 of the EA:

> [A]reas in the 718-701-R soil complex are extremely rocky. This combined with the steepness of slopes and low available water capacity create high regeneration hazards (especially in swale areas where dry ravel [sic] accumulates). Some units may not be plantable. These areas however are a good source for rock material.

Appellant states that four units with this soil complex encompassing 76 acres are scheduled for clear-cutting. Appellant also questions whether four other units with soil complex 718-701-F might also be misclassified as high intensity lands.

BLM's response persuades us that the questioned units were, in fact, not misclassified. BLM explained as follows:

> The soil scientist's report indicates that the 718-701-R soil complex is common on the Woodrat Timber Sale. The order in which the soils are listed indicates their prevalence, i.e. the 718 is the most prevalent soils, the 701 second, and the R, or rock, third. The 718 makes up about 70 percent of the area in the mapping unit, the 701 approximately 20 percent, and the R, or rock, about 10 percent. The 718 (Beekman) series is a skeletal soil, greater than 35% rock content, but is moderately deep. Occurring in the Beekman soils are pockets of the shallower 701 series. Scattered rock outcrops ("R" series" can be found in the contract area.
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> At the time the report was written, timber sale units had not yet been selected for the Woodrat Timber Sale. That "some units may not be plantable" refers to the whole area reviewed and not to actual sale units.
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> Bureau policy requires that an area be at least 60% plantable to be retained in the high intensity land base. Experience has shown that the Beekman soil complex is considered routinely plantable. It is expected that small patches in the complex cannot be planted (outcrops, excess rock, or shallowness), but that inclusions will not reduce plantable areas below 60%.
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> Units 14, 18, 23, and 50 are within the 718-701-R soil complex. There are several existing clearcut units harvested in 1965 and intermingled with the proposed timber sale units on Woodrat Mountain. Recent surveys show that seven of these units totalling 73 acres are considered stocked-established, with an average (weighted) stocking of 60%. One unit of 13 acres was withdrawn earlier from the base because of the rocky site. Two additional units totalling 19 acres are found on a related soil complex (718-781), which is characterized by a lower percentage of rock. One of these is presently 87% stocked-established; the other is stocked-unestablished at 100%, having been replanted in 1982.
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> Appellant has questioned the 718-701F soil as not being mentioned in the EA. The 718-701-F complex is similar to that described as 718-701-R, but has less exposed rock. The F comes from Soil Conservation Service (SCS) slope classifications which were utilized in the BLM soil classifications. They classify the slopes with letters from A to F, F being the steepest. The F means that the slope is greater than 35 percent. Appellant claims that units within the 718-701-R and 718-701-F soil complex may be classified incorrectly under the TPCC. Units with this soils classification are capable of high intensity management and therefore are not classified incorrectly under the TPCC as alleged by the appellant.

(BLM Response at 3-4).

Appellant states that 55 acres of the sale area are scheduled for overstory removal harvest techniques, but argues that the area does not qualify

for such treatment. Appellant appears to believe that overstory removal is only appropriate after a regeneration cut. BLM points out that this is not true. The FES at page 1-29 provides that 10,500 acres of the 32,800 acres of high intensity lands scheduled to receive final shelterwood harvest are composed of two-storied stands, and that the overstory would be removed from these stands. BLM states that the 55 acres in question are part of the 10,500 acres.

Appellant is concerned that the understory mortality rate from this type of logging will be high and may approach clear cut classification. BLM claims to share appellant's concern, and it states that special provisions have been included in the contract to minimize damage to the understory in the units in question. We find no basis on which to sustain appellant's objection to overstory removal.

Appellant makes a number of arguments relating to the VRM provisions of the FES. First, he claims those provisions are violated because the timber sale is in a residential area. The sale is surrounded by and surrounds residential areas, he contends. BLM says this is wrong. The EA states that there are approximately 50 residences within 1 mile of the sale. BLM points out, however, that the land in the sale area is zoned by the county as forest resources, woodland resources, or exclusive farm use, and that the sale is compatible with these uses. BLM states that there is nothing in the county zoning to indicate a significant change in land use since the implementation of the FES. Appellant acknowledges that the zoning has not changed, but he asserts that actual land use has changed. Clearly, BLM is aware of the residences, but it does not consider that land use has changed significantly. Although appellant may disagree, we cannot find that the reasons set forth by appellant establish a violation of the VRM provisions.

Next, appellant contends that a proposed quarry development within the sale area violates the VRM provisions. This is emphatically denied by BLM. Appellant's concern is that a "massive amount of rock will be removed from a highly elevated and highly visible segment of Woodrat Mtn" (Statement of Reasons at 7). He states that the area in question falls within VRM Class III. That class is defined in the FES at page 2-48 as: "Class III: Changes in the basic elements (form, line, color, texture) caused by a management activity may be evident in the characteristic landscape. However, the changes should remain subordinate to the visual strength of the existing character." Appellant argues that a quarry of this "immense" size, located high up on the side of a mountain does not make a change which is subordinate to the visual strength of the existing character of the mountain. 5/

5/ Appellant in his statement of reasons claims that BLM proposes to extract 731,970 cubic feet of rock from the quarry. In its response, BLM states that "[c]ontrary to appellant's claim, we do not propose to extract 731,970 cubic feet of rock, which is equivalent to 27,110 cubic yards, the common terminology used in sale contract. The timber sale proposes to extract 19,243 cubic yards" (BLM Response at 5). In his rebuttal, appellant admits the incorrect figure but continues to maintain that the quarry will be "massive" in size, pointing out that the quarry will remain open after the completion of this sale (Rebuttal at 3).

BLM takes exception to appellant's size characterization. Rather than "immense," BLM states the proposal is for a relatively small quarry near the end of an existing road. BLM states further that the development will flatten off the ridge on which it is located and will have a very low visual impact. It asserts that development of the quarry is in conformance with VRM Class III guidelines. BLM continues by stating that the majority of the sale area is actually VRM Class IV, which allows management activities which are visually apparent and may become dominant in the landscape. According to Attachment 3b to BLM's response, only part of the proposed quarry development lies on VRM Class III lands, and BLM asserts that the development will remain subordinate to the visual strength of the existing character. Appellant states that the entire development is VRM Class III lands. He directs our attention to the map at page 2-46 of the FES, and contends that the map clearly shows the boundary of VRM Class III land to be east of Woodrat Mountain.

Although the FES map cited by appellant does show the VRM Class III line east of Woodrat Mountain, the scale on that map is so small that it is not unreasonable to believe that the actual dividing line is as depicted by BLM on Attachment 3b, a topographic map of much larger scale than the FES map. Regardless of whether the quarry development lies completely or only partially on VRM Class III lands, the record does not support appellant's claim that the VRM classification standards have been violated. Although appellant may disagree with BLM's conclusion that the development will remain subordinate to the visual strength of the existing character, nothing presented by appellant provides a sufficient basis for us to conclude that BLM's determination is clearly erroneous.

Appellant also maintains that BLM did not consider scenic values as they relate to certain units along Sterling Creek Road. Appellant contends that Sterling Creek Road was hard surfaced by the county "to provide a scenic alternate route to * * * Applegate Lake" (Statement of Reasons at 6). Seven units are directly visible from the road, appellant claims, with some units coming to the edge of the road. Appellant contends that the LIM units are located on one of the most scenic segments of the road and that there is little or no hope for regeneration in those units.

In response, BLM points out that the road was not improved to provide a scenic alternative route to Applegate Lake, but that improvement was merely undertaken by the county as part of its program to upgrade county roads. The road does not appear as a county scenic highway on Attachment 4b (a map of county scenic highways) to the BLM's response. BLM states: "The goal was to bring narrow gravel roads up to a higher standard by widening and oiling the roads. The improvement has been done in segments going back more than 10 years. It was improved because of residents' complaints about dust and safety for school buses" (BLM Response at 6).

BLM states that five units are visible from the road; the two LIM units are on the backside of a ridge and not visible from the road; all seven units are in VRM Class IV areas; three of the five units are overstory removal units and will have minimal visual impact on the area; the LIM units were selected by FIR from a list of units which BLM provided based on criteria set forth by FIR; two of the five units visible from the road will be clear-cut but such units meet the VRM Class IV guidelines; and none of the units come to the

edge of the road, there being a 200-foot or more timbered buffer between the road and the closest unit.

Based on the record presented, we find that Sterling Creek Road has received no official sanction that would require alteration of the present timber sale. The sale lands in question are VRM Class IV. There is no evidence that the proposed cutting of timber on such lands would violate any statute or regulation. While appellant may find such cutting objectionable for aesthetic reasons, we are unable to find that the sale should be curtailed on that basis.

Appellant states that the silvicultural prescription for the sale provides for the use of herbicides as a site preparation tool. Appellant charges that this is illegal because a Federal court has restrained their use and that since herbicides cannot be used, the allowable cut should be reduced.

BLM admits that herbicides are banned. It explains that the silvicultural prescription was prepared prior to the Federal court ban. BLM states that the area silviculturist has reexamined the sale units and has determined that they could be stocked to minimum stocking standards within 5 years without using herbicides. With respect to reduction of allowable cut while herbicides are banned, BLM responded:

> The Medford District's allowable cut has already been reduced because of insufficient funding for intensive forestry measures proposed in the allowable harvest plan. The FY'83 allowable cut was reduced 5 MM bd. ft. because of the non-use of herbicides. The Medford District FY'84 allowable cut was reduced by 28 MM bd. ft. due to lack of funding for intensive forest management. The allowable cut for FY'85 and beyond is uncertain because of funding and the 9th Circuit Court affirmation of the District Court's ban on the use of herbicides on the Medford District.

(BLM Response at 7).

The record is clear that BLM does not intend to use herbicides and that the allowable cut has been adjusted downward for that reason and because of insufficient funding. In his rebuttal appellant claims that the adjustment for the herbicide ban is insufficient. He cites the FES at page 1-21 as requiring an adjustment of 17.94 MM bd. ft., while BLM has reduced the allowable cut only 5.5 MM bd. ft. due to the herbicide ban.

Appellant's reference to the FES is to Table 1-7 titled "Effect of Assumed Practices on Annual Harvest volume, High Intensity Lands, Sustainable Annual Harvest." The figure quoted by appellant appears in the column for "Vegetation Management" under the Jackson Sustained Yield Unit. Appellant assumed that since the figures were increased by 17.94 MM bd. ft. because of vegetative management practices, the ban on herbicides should result in a concomitant decrease. We cannot agree. There is no evidence that herbicide use is the only vegetative management practice utilized by BLM. In addition, BLM states that its silviculturist determined that all units could be stocked to minimum stocking standards without herbicides.

Appellant complains that the threatened and endangered plant survey was inadequate for three units. He states that the record shows that the forester covered the 51 acres in these units in 3 hours. Appellant cites this as evidence of his charge that the sale was "hastily constructed" (Statement of Reasons at 8). In response BLM states that the survey in question was conducted by an individual who had previously spent 2-1/2 days on a threatened and endangered plant survey on the same sale. It contends that for that reason the individual was familiar with the flora of the area. BLM believes the timber sale area was adequately surveyed. BLM points out that there is no specified intensity for the survey.

The basis for appellant's charge of inadequacy appears to be only the amount of time spent on the survey. He does not point to any specific threatened or endangered plant that he or others have identified in the sale area. He states generally that threatened and endangered plants are known to exist in the area. While the survey might have been more thorough, appellant has failed to establish his claim of inadequacy.

[2] All of appellant's complaints regarding this proposed sale are directed at establishing that this sale was poorly planned and should not be allowed to go forward. To the contrary, the record shows that BLM followed applicable law, the FES, and other relevant procedures in offering the Woodrat Mountain tract for sale. In many instances appellant's criticisms and concerns reflect, in essence, disagreement with BLM's conclusions. They fall short, however, of establishing that BLM's actions were clearly erroneous or contrary to applicable law. The Board gives deference to BLM actions which are based on its expertise and which are taken pursuant to defined statutory authority where those actions are supportable. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion. In Re Otter Creek Timber Sale, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge